Dr Chan Choo Lip v Malaysian Medical Council, Ministry of Health Malaysia & Anor

HIGH COURT (KUCHING) — JUDICIAL REVIEW NO JR-6 OF 2010-III
RHODZARIAH BUJANG JC
4 JUNE 2010

Civil Procedure — Certiorari — Application for leave to apply — Forty-day period from date when grounds for application first arose, computation of — Whether applicant had locus standi — Rules of the High Court 1980 O 53 r 3(6)

Constitutional Law — Autrefois acquit — Disciplinary proceedings — Applicant acquitted in court of law — Subsequent disciplinary proceedings against applicant by professional body — Whether applicant's acquittal bar against disciplinary proceedings — Whether plea of autrefois acquit applicable

Criminal Procedure — Autrefois acquit — Applicant acquitted in court of law — Subsequent disciplinary proceedings against applicant by professional body — Whether applicant's acquittal bar against disciplinary proceedings — Whether plea of autrefois acquit applicable

Professions — Medical practitioners — Medical council inquiry — Medical practitioner acquitted in court of law — Subsequent disciplinary proceedings instituted by medical council — Whether medical practitioner's acquittal bar against disciplinary proceedings — Policy reasons against bar — Public interest

The applicant-doctor ('the applicant') was charged in the sessions court with 33 offences under the Poisons (Psychotropic Substances) Regulations 1989 and the Drugs and Cosmetic Regulations 1984. By letter dated 20 November 2008, the Malaysian Medical Council ('the MMC') informed the applicant that it intended to hold an inquiry against the applicant following a report sent by the Sarawak Deputy Director of Health. The inquiry was postponed pending the conclusion of the trial of the criminal charges against the applicant. The applicant was subsequently acquitted of all 33 charges by the sessions court on 28 January 2009 and 27 August 2009. However on 19 March 2010, the MMC wrote a second letter to the applicant informing him that an inquiry would be held against him based on a Complaint Information lodged by one George Wong from the Ministry of Health. The applicant applied to the High Court for leave to issue a writ of certiorari to quash the decision of the

MMC to hold the said inquiry. The applicant contended, inter alia, that since the inquiry was based on the 33 charges against him, his acquittal on all 33 charges rendered the MMC's decision to hold the inquiry an abuse of the process and amounted to a collateral attack on the decision of the criminal court in acquitting him. The respondents objected to the application on four grounds, to wit: (a) delay; (b) there was no 'reviewable decision'; (c) the applicant had no locus standi to make the application; and (d) the applicant failed to exhaust the remedies available to him under the Medical Act and its Regulations.

Held, dismissing the application with costs:

(1) There was no merit to the respondents' argument that the applicant should have made the application upon receipt of MMC's first letter (of 20 November 2008). The first letter and the proposed first inquiry had been overtaken by the issuance of the second letter (of 19 March 2010) and the proposed second inquiry. More importantly, the whole basis of the applicant's application for leave rested on the fact that the sessions court had acquitted the plaintiff and therefore the inquiry should not be held. The decision of the sessions court only came after the first letter and therefore the 40 days period under O 53 r 3(6) of the Rules of the High Court 1980 should run from the date of the second letter, ie 19 March 2010). The applicant's application having been filed on 16 April 2010, was within the prescribed time (see para 7).

(2) The applicant's acquittal by the sessions court was not a bar to the disciplinary proceedings initiated against him. There was therefore no decision adverse against him that needed to be further examined and argued. The applicant lacked the locus standi to make his leave application (see para 18); *Hunter v Chief Constable of West Midlands & Anor* [1981] 3 All ER 727 distinguished; *Harry Lee Wee v Law Society of Singapore (see correspondence at PXIII supra)* [1985] 1 MLJ 1 distinguished; *Connelly v Director of Public Prosecutions* [1964] 2 All ER 401 followed; *Regina v Statutory Committee of the Pharmaceutical Society of Great Britain, Ex parte Pharmaceutical Society of Great Britain* [1981] 1 WLR 886 followed.

(3) The MMC is entitled to enforce the rules regulating the conduct and practice of its members in the interest of not just its members but the public as well. Thus, the acquittal or conviction of any of its members in a court of law for criminal offences should not, given its supervisory and regulatory task, be binding on the council (see para 21).

(4) Only convictions by a court of law are binding on the MMC but not acquittals. When a conviction is entered, there must already be proof beyond reasonable doubt of the offence alleged but an acquittal may be had for a myriad of reasons, both technical and substantive. This is the

rationale behind the MMC's power to further enquire into an alleged misconduct of a member, notwithstanding an acquittal. In the instant case, although the applicant had to go through a second round of hearing, there was a larger interest at stake, namely that of the public (see paras 23–24).

[Bahasa Malaysia summary

Pemohon-doktor ('pemohon') dituduh di mahkamah sesyen dengan 33 kesalahan di bawah Peraturan-Peraturan Racun (Bahan-Bahan Psikotropik) 1989 dan Peraturan-Peraturan Kawalan Dadah dan Kosmetik 1984. Melalui surat bertarikh 20 November 2008, Majlis Perubatan Malaysia ('MPM') memberitahu pemohon bahawa ia berniat untuk menjalankan siasatan terhadap pemohon berikutan laporan yang dihantar oleh Timbalan Pengarah Kesihatan Sarawak. Siasatan ditunda sementara menunggu keputusan perbicaraan jenayah terhadap pemohon. Pemohon kemudiannya dibebaskan daripada kesemua 33 tuduhan oleh mahkamah sesyen pada 28 Januari 2009 dan 27 Ogos 2009. Walau bagaimanapun pada 19 Mac 2010, MPM menulis surat kedua kepada pemohon memberitahunya bahawa siasatan akan dijalankan terhadapnya berdasarkan maklumat aduan yang dilaporkan oleh seorang yang bernama George Wong daripada Kementerian Kesihatan. Pemohon memohon kepada Mahkamah Tinggi keizinan mengeluarkan writ certiorari untuk membatalkan keputusan MPM untuk menjalankan siasatan tersebut. Pemohon berhujah, antara lain, bahawa memandangkan siasatan tersebut adalah berdasarkan ke atas 33 tuduhan terhadapnya, pembebasannya terhadap 33 tuduhan tersebut menyebabkan keputusan MPM untuk menjalankan siasatan tersebut merupakan penyalahgunaan proses dan adalah serangan kolateral ke atas keputusan mahkamah jenayah dalam membebaskannya. Responden-responden membantah terhadap permohonan tersebut atas empat alasan, iaitu: (i) kelewatan; (ii) tidak terdapat 'reviewable decision'; (iii) pemohon tidak mempunyai locus standi untuk membuat permohonan; dan (iv) pemohon gagal untuk menggunakan remedi-remedi yang ada di bawah Akta Perubatan dan Peraturan-Peraturannya.

Diputuskan, menolak permohonan dengan kos:

(1) Tidak terdapat merit terhadap penghujahan responden-responden bahawa pemohon patut membuat permohonan tersebut selepas menerima surat pertama MPM (surat 20 November 2008). Surat pertama dan siasatan pertama yang dicadangkan telah diatasi oleh pengeluaran surat kedua (surat 19 Mac 2010) dan siasatan kedua yang dicadangkan. Lebih penting lagi, kesemua dasar permohonan pemohon untuk keizinan bergantung atas fakta bahawa mahkamah sesyen telah membebaskan plaintif dan oleh itu siasatan tidak patut dijalankan. Keputusan mahkamah sesyen hanya dibuat selepas surat pertama dan oleh itu tempoh 40 hari di bawah A 53 k 3(6)

Kaedah-Kaedah Mahkamah Tinggi 1980 patut bermula dari tarikh surat kedua iaitu 19 Mac 2010. Permohonan pemohon setelah difailkan pada 16 April 2010, adalah dalam masa yang ditetapkan (lihat perenggan 7).

(2) Pembebasan pemohon oleh mahkamah sesyen bukan halangan kepada prosiding tatatertib yang dimulakan terhadapnya. Oleh itu tidak terdapat keputusan bertentangan terhadapnya yang perlu diperiksa dan dihujah lebih lanjut. Pemohon tidak mempunyai locus standi untuk membuat permohonan keizinannya (lihat perenggan 18); *Hunter v Chief Constable of West Midlands & Anor* [1981] 3 All ER 727 dibeza; *Harry Lee Wee v Law Society of Singapore (see correspondence at PXIII supra)* [1985] 1 MLJ 1 dibeza; *Connelly v Director of Public Prosecutions* [1964] 2 All ER 401 diikut; *Regina v Statutory Committee of the Pharmaceutical Society of Great Britain, Ex parte Pharmaceutical Society of Great Britain* [1981] 1 WLR 886 diikut.

(3) MPM berhak untuk menguatkuasakan kaedah mengawal tindakan dan amalan ahli-ahlinya untuk kepentingan bukan sahaja ahli-ahlinya tetapi juga orang awam. Oleh itu, pembebasan atau sabitan mana-mana ahlinya di dalam mahkamah undang-undang untuk kesalahan jenayah tidak patut, mengikut tugas-tugas pengawasan dan pengawalannya, mengikat Majlis (lihat perenggan 21).

(4) Hanya sabitan oleh mahkamah undang-undang mengikat MPM tetapi bukan pembebasan. Apabila sabitan dikenakan, mesti terdapat bukti melampaui keraguan munasabah terhadap kesalahan yang didakwa tetapi pembebasan boleh diberikan untuk alasan yang tidak terkira banyaknya, teknikal dan substantif. Ini adalah rasional di sebalik kuasa MPM untuk menyiasat selanjutnya salah laku yang didakwa terhadap ahlinya, tanpa mengira pembebasan. Dalam kes ini, walaupun pemohon terpaksa melalui pendengaran pusingan kedua, terdapat kepentingan lebih besar yang menghadapi risiko, iaitu kepentingan awam (lihat perenggan 23–24).]

Notes

For a case on disciplinary proceedings, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 1888.

For cases on application for leave to apply, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1657–1670.

For cases on autrefois acquit in general, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 816–840.

for cases on medical council inquiry, see 10 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 1611–1612.

Cases referred to

Connelly v Director of Public Prosecutions [1964] 2 All ER 401, HL (distd)
Harry Lee Wee v Law Society of Singapore (see correspondence at PXIII supra) [1985] 1 MLJ 1, PC (distd)
Hunter v Chief Constable of West Midlands & Anor [1981] 3 All ER 727, HL (distd)
Mohamed Yusoff bin Samadi v Attorney-General [1975] 1 MLJ 1 (folld)
Peter Ziderman v General Dental Council [1976] 1 WLR 330, PC (refd)
Regina v Statutory Committee of the Pharmaceutical Society of Great Britain, Ex parte Pharmaceutical Society of Great Britain [1981] 1 WLR 886, QBD (folld)
Regina (Redgrave) v Commissioner of Police of the Metropolis [2003] 1 WLR 1136, CA (refd)
Simpson v General Medical Council [1955] NZLR 271, PC (refd)
Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors [2006] 5 MLJ 60; [2006] 1 CLJ 927, CA (refd)

Legislation referred to

Drugs and Cosmetic Regulations 1984
Medical Act 1971
Medical Regulations 1974
Poisons (Psychotropic Substances) Regulations 1989
Rules of the High Court 1980 O 53 rr 2, 3(6)

Thomas Shankar Ram (Thomas Shankar Ram & Co) for the applicant.
See Chee How (Baru Bian Advocates) for the respondents.
Azizah bt Hassan (Deputy Public Prosecutor standing in for Mohd Taufik bin Mohd Yusoff (Senior Federal Counsel) for the Federal Attorney General's Chambers.

Rhodzariah Bujang JC:

RULING

[1] The applicant is a doctor practicing under the name and style of Lee Clinic in a small town of Serian near Kuching. He is registered under the Medical Act 1971 and Medical Regulations 1974. In 2008 he was charged with 33 counts of offences under the Poisons (Psychotropic Substances) Regulations 1989 and the Drugs and Cosmetic Regulations 1984. These charges were preferred against him following an inspection conducted by a pharmacist team from the Ministry of Health headed by one Puan Rabiawati bt Omar. In the main, the complaint against the applicant was he allegedly did not keep a proper record of the psychotropic pills in his clinic. By a court order dated 28 January 2009 and on 27 August 2009 respectively, he was acquitted of all 33 charges.

[2] However, before these court orders were made against the applicant, by a letter dated 20 November 2008, the Malaysian Medical Council wrote to the applicant to inform him that the Malaysian Medical Council would be holding an inquiry against him on *26 February 2009* based on a report forwarded by the Sarawak Deputy Director of Health (Pharmacy).

[3] There is evidence shown that this proposed inquiry was postponed pending the conclusion of the criminal charges against him and vide a letter dated *19 March 2010* the Malaysian Medical Council has informed the applicant their decisions to conduct an inquiry into his 'alleged infamous conduct in a professional respect based on a Complaint Information by George Wong Lai Khai @ Rusdy in a letter dated *16 June 2008* from the Ministry of Health, Malaysia'. The applicant has now filed an application for leave to issue a writ of certiorari to quash the decision of the Malaysian Medical Council ('the first respondent') to hold the said inquiry.

[4] If I may summarise, the grounds of his application as shown in his affidavit in support is that since the proposed inquiry is based on the same raid by the said pharmacist team which resulted in the 33 charges being framed against him and in view of his acquittal of all 33 charges, the decision by Malaysian Medical Council to hold the inquiry is, inter alia, an abuse of the process and their powers and it amounts to a collateral attack on the decision of the criminal court in acquitting him of the 33 charges. He further contended that the decision of the criminal court must be respected and accepted as final by the professional body that has supervisory jurisdiction over the applicant and of which he is a member.

IS THE APPLICATION FOR LEAVE FRIVOLOUS?

[5] My role, at this stage, is only to consider if the application is frivolous as for example whether it was made out of time or against a person or body who cannot be sued. I shall not go into the merits of the case (see *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* [2006] 5 MLJ 60 at p 76 ; [2006] 1 CLJ 927 at p 943).

[6] The respondents have objected to this application *firstly*, on the ground of delay, *secondly*, that there was no 'reviewable decision' and *thirdly*, the applicant has no locus standi to make this application. Lastly, and *fourthly*, that he has failed to exhaust the remedy available to him under the Medical Act and its Regulations.

DELAY

[7] I see no merit in the argument of the respondents that the applicant

should have made this application upon receipt of the first letter on 20 November 2008 and by making this application now he is outside of the 40 days period prescribed by O 53 r 3(6) of the Rules of the High Court 1980. This is simply because that first letter and the proposed first inquiry had been overtaken by events ie the issuance of the second letter and the proposed second inquiry. But, more importantly, the whole basis of the applicant's application for leave now rests on the fact that the sessions court had acquitted the plaintiff and therefore the inquiry should not be held. The decision of the sessions court only came after the first letter and in the circumstance the 40 days period under O 53 r 3(6) of the Rules of the High 1980 should run from the date of the second letter ie 19 March 2010. This application having been filed on 16 April 2010, the applicant is well within the time limited for him to make it.

NO REVIEWABLE DECISION

[8] The respondents argued that the decision to hold the inquiry is not a reviewable decision and cited firstly, O 53 r 2 of the Rules of the High Court 1980.

[9] Order 53 r 2 provides that:

> Any persons who is *adversely affected* by the *decision* of any public authority shall be entitled to make the application.

[10] They submitted that the second respondent has yet to make a decision which is adverse against the applicant so this application is infact premature.

[11] Mr Shankar Ram's counter argument on this is that in view of his client's acquittal in the sessions court, the holding of the inquiry is prejudicial to his client. One of the cases cited by him is that of the Privy Council, *Harry Lee Wee v Law Society of Singapore (see correspondence at PXIII supra)* [1985] 1 MLJ 1 in which it was held that the doctrine of *autrefois acquit* and convict is applicable to disciplinary proceedings under a statutory code by which a profession is governed. Citing *Connelly v Director of Public Prosecution* [1964] 2 All ER 401, the House of Lords held that the appellant in that case is entitled to rely on the order made against him in the first proceedings as a complete bar to further disciplinary action against him in the second proceedings. In other words, they are stopped from bringing this action against his client.

[12] The respondents too have their own case authorities to say otherwise and one of it is also a Privy Council decision, *Peter Ziderman v General Dental Council* [1976] 1 WLR 330 which involves a dentist who was convicted by the court and it was held by the Privy Council that the disciplinary proceedings held after his conviction is not to punish him a second time for the same

offence but to protect the public who may come to him as patients and to maintain the high standards and good reputation of an honourable profession. In the same submission, the respondents' counsel also quoted *Spence Bower, Turner and Handley on The Doctrine of Res Judicata*, (3rd Ed) at pp 173–174. I find the said quotation helpful to shed some understanding on the arguments of counsel made herein and have taken the liberty to reproduce it below:

> ... Neither a conviction nor an acquittal will bar disciplinary proceedings based on the same conduct because the purpose of such proceedings is not to punish, but to maintain the standards of the profession (*Re Weare* [1893] 2 QB 439 (CA); *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750 (CA); *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279; *Re a Medical Practitioner* (1959) NZLR 784 (CA); *New South Wales Bar Association v Evatt* (1968) 117 CLR 177 at pp 183–184). In *Re a Medical Practitioner*, North and Clearly JJ said:
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> > The council may be concerned with many kinds of conduct which cannot constitute offences punishable by law, such as improper advertising, the commission of adultery with a patient, and unethical practices; when it becomes concerned with conduct which constitutes an offence, it is not for the purpose of punishing that conduct as an offence against the public, which is the purpose of the criminal law, but because it is conduct which may show that the practitioner concerned is no longer fit to continue to practice the profession... *we were not referred to any case in which the pleas of autrefois acquit or autrefois convict had succeeded except before a court or judicial tribunal claiming jurisdiction to punish the offence charged as being a breach of the criminal law*. (Emphasis added.)

[13] In addition, my attention was drawn to a number of decisions both decided in Malaysia and in England where the point made by counsel above was repeated and as a reference point I would list out these cases below:

(a) *Mohamed Yusoff bin Samadi v Attorney General* [1975] 1 MLJ 1 at pp 3–4 of the judgment:

> In my view, no principle of law precludes a man who has been acquitted or convicted upon a set of facts alleged to constitute an offence being subsequently subjected upon the same facts to disciplinary action by a domestic tribunal.

(b) *Regina (Redgrave) v Commissioner of Police of the Metropolis* [2003] 1 WLR 1136 at pp 1144B–1146D.

(c) *Regina v Statutory Committee of the Pharmaceutical Society of Great Britain, Ex parte Pharmaceutical Society of Great Britain* [1981] 1 WLR 886 at p 893G-H.

[14] The respondents' counsel had also distinguished the Privy Council's decision in *Harry Lee*'s case, and to which I agree and that is, that decision concerns *a double disciplinary proceedings* instituted against the appellant. It is obviously not the case here. As for the principle established in *Connelly*'s case as stated above, it was made in relation to *criminal proceedings* instituted against him *twice* for two offences — one armed robbery and the other for murder which was committed in the same transaction.

[15] Mr Shankar Ram had also referred to the case of *Hunter v Chief Constable of West Midlands & Anor* [1981] 3 All ER 727 a House of Lords' decision which he said entitles the applicant to launch his 'pre-emptive strike' against the respondents but again there is an apparent distinguishing factor present, in that the issue in that case was whether estoppel applies in respect of a civil action for damages founded upon a criminal action in which the accused person had been acquitted.

[16] So, just like in *Harry Lee*'s and *Cornelly*'s cases the principle established in the cited cases is not applicable here.

[17] On the other hand the case authorities referred to by the respondents' counsel as I mentioned earlier are straight on the point. I wish to especially highlight the decision in the *Pharmaceutical Society of Great Britain* in which Lord Lane CJ held that the 'maxim nemo debet bis puniri pro uno delicto' (ie no one should be punished twice for the same offence) does not preclude a statutory committee from enquiring into the misconduct of the students of London School of Pharmacy after they have been conditionally discharged from a conviction of unlawfully wounding another student. His Lordship said this is because the offence and findings of a disciplinary tribunal differed from those of a criminal court and such a tribunal was not a court of competent jurisdiction.

[18] Based on these authorities, I am satisfied that the acquittal by the sessions court of the applicant is not a bar to the disciplinary proceedings intended to be initiated against him. There is therefore no decision which is adverse to him which needs to be further examined and argued. On the same reasonings, the applicant lacks the locus standi to make this leave application and it must be refused.

[19] Having arrived at this decision at this juncture I see no necessity to discuss the last ground of objection of the respondents as stated earlier.

[20] In conclusion, I would dismiss the application for leave with costs to be taxed unless agreed and end this judgment with this observation.

[21] The Medical Act is designed to regulate the conduct and practice of its member. The medical profession being a professional body is required to maintain a high standard of practice, ethics and discipline for the protection of the public that it serves. The Medical council is therefore entitled to enforce the rules regulating the conduct and practice of its members in the interest of not just its members but the public as well. Thus, the acquittal or conviction of any of its member in the court of law for criminal offences should not, given their supervisory and regulatory task, be binding on the council.

[22] In this regard, the respondents' Code of Criminal Conduct under the title 'Convictions In A Court of Law' is pertinent and it provides as follows:

> In considering convictions the *Council is bound to accept the determination of any court of law as conclusive evidence that the practitioner was guilty of the offence of which he was convicted Practitioners who face a criminal charge should remember this if they are advised to plead guilty, or not to appeal against a conviction merely to avoid publicity or a severe sentence. It is not open to a practitioner who has been convicted of an offence to argue before the Preliminary Investigation Committee*, or the Malaysian Medical Council *that he was in fact innocent*. It is therefore unwise for a practitioner *to plead guilty in a court of law to a charge to which he believes that the has a defence*. (Emphasis added.)

[23] As rightly pointed out by the respondents' counsel, only convictions by the court are binding on the council but not acquittals and the reason is obvious. When a conviction is entered, there must already be proof beyond reasonable doubt of the offence alleged but an acquittal can be had for a myriad of reasons both technical and substantive. Thus the rationale behind the council's power to further enquire into the alleged misconduct of its member, despite the acquittals. The above represent my own view, of course, but in coming to it, I am enlightened by the quotation made in the *Pharmaceutical Society of Great Britain*'s case from the decision of Viscount Simonds in *Simpson v General Medical Council* [1955] NZLR 271 (PC) *The Times, November 9, 1955* in which His Lordship said this:

> The Medical Acts are designed at the same time to protect the public and to maintain the high professional and ethical standards of an honourable calling. If a practitioner, having committed the grave offences of which the appellant has been guilty, can upon such a plea successfully resist the charge of infamous conduct and the erasure of his name from the register, the public will lack their proper protection and the honour of the profession may be endangered by the continued practices of one who can still claim to be of their number.

[24] Thus, although one would sympathise with the applicant for having to go through a second round of hearing, there is a larger interest at stake — that of the public.

Application dismissed with costs.

Reported by Andrew Christopher Simon